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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES R. LINDSEY, as Trustee, etc., et al.,

Plaintiffs and Respondents,

v.

ALIEU B. M. CONTEH et al.,

Defendants and Appellants.

G054219

(Super. Ct. No. 30-2014-00739428)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Genga & Associates, John M. Genga and Khurram A. Nizami for Defendants and Appellants.

Donna Bader; Bremer Whyte Brown & O'Meara, Nicole Whyte and Benjamin J. Price; Newmeyer & Dillion, Thomas F. Newmeyer, Gregory L. Dillion, Rondi J. Walsh and Jason Moberly Caruso; and Aires Law Firm and Timothy Carl Aires for Plaintiffs and Respondents.

* * *

In this high stakes shareholder derivative lawsuit, defendants Alieu B. M. Conteh (Conteh), Odessa Capital Inc., Dominique Financial, Ltd., OOA ONE, LLC, and OOA TWO, LLC (collectively, defendants), appeal from a default judgment entered against them which is arguably valued at approximately $94 million. The judgment, which awarded plaintiffs James R. Lindsey, as trustee of the Lindsey Family Trust, William Buck Johns, Wymont Services, Ltd. and Marc van Antro (collectively, plaintiffs), a constructive trust on behalf of nominal defendant African Wireless, Inc. (African Wireless) over certain shares in two telecommunications businesses, resulted from terminating sanctions being granted against defendants by a general reference discovery referee. The referee found defendants engaged in a pattern of discovery abuse, not the least of which was violating three of the referee's prior discovery orders.

Defendants contend both the discovery referee and the trial court committed error. Among other things, they argue the referee was without authority to grant terminating sanctions and violated their due process rights in doing so, and the court awarded relief which an exhibit attached to the operative complaint shows is unavailable. Our thorough review of the extensive record leads us to conclude otherwise. Accordingly, we affirm the judgment.

I

FACTS[1]

Plaintiffs filed this shareholder derivative action on behalf of African Wireless, alleging that over the course of nearly a decade, Conteh took various actions and engaged in transactions that were detrimental to African Wireless's interests and that

[1] Because of the nature of this appeal, we provide only an abbreviated version of the background facts. Further detail can be found in a prior opinion by which we affirmed an order imposing monetary sanctions against defendants due to discovery violations. (*Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296 (*Lindsey I*).)

usurped opportunities belonging to it. The causes of action in the complaint included breach of fiduciary duty, unjust enrichment, and accounting and conversion, and among the relief sought were monetary damages, prejudgment interest, injunctive relief, declaratory relief and a constructive trust.

Tension between the parties began early on in the litigation and became particularly evident as they commenced discovery. At the trial court's direction, the parties met and conferred to discuss the possibility of a discovery referee. Those discussions led to a stipulation of the parties, and a reference order by the court, that a referee would oversee "all discovery matters . . . unless and until such a time that the [c]ourt [were to] order[] otherwise." Among the broad powers given to the referee were "the authority to set the date, time, and place for any hearings determined by the discovery referee to be necessary, to preside over hearings, to take evidence if the referee so determines, rule on discovery objections, discovery motions, and other requests made during the course of the hearing."

The parties propounded a plethora of discovery on one another, with battle after battle arising at every turn. Months into the litigation, plaintiffs moved to compel Conteh, as an individual and as a representative of the business entity defendants, to appear for a deposition and produce a variety of documents. In January 2015, the referee entered a detailed ruling and order granting plaintiffs' motions and specifying the steps Conteh needed to take (the January 2015 discovery order).

After a number of months, and believing Conteh did not comply with the January 2015 discovery order concerning document production, plaintiffs moved for terminating, evidentiary, contempt and monetary sanctions. Following a hearing, the referee issued a ruling that detailed the multiple ways in which Conteh had violated the discovery order at issue. The referee ordered further compliance by Conteh, and concluded that $100,000 in monetary sanctions were warranted (the May 2015 discovery

order). Defendants unsuccessfully appealed, as we found no error in the imposition of monetary sanctions. (*Lindsey I*, *supra*, 9 Cal.App.5th at pp. 1298-1299.)

During the pendency of defendants' prior appeal, discovery and related proceedings continued before the referee. Believing Conteh was in violation of the May 2015 discovery order, plaintiffs once again filed a motion for terminating, evidentiary, contempt and monetary sanctions. The referee heard the matter in October 2015. Noting in her ruling that it appeared defendants misread the May 2015 discovery order, the referee declined to find they had willfully disobeyed it, meaning sanctions were unwarranted. The resulting order nevertheless mandated that defendants comply with the prior discovery orders by taking specified steps before a certain date (the October 2015 discovery order).

Around the same time, defendants' now-former counsel filed motions to be relieved as counsel of record. The motions were heard two months later, at which time the court granted them. It also set a status conference for six weeks thereafter to provide defendants time to seek new counsel.

A few weeks later, after an unsuccessful meet and confer with Conteh concerning outstanding discovery, plaintiffs noticed another motion for discovery sanctions. They claimed "[d]efendants . . . disobeyed three Discovery Referee orders, . . . failed to produce basic records admittedly in their possession, and . . . refused to produce a single additional document in spite of the Referee's [October 2015 discovery order]." As before, among the alternative sanctions sought were terminating sanctions.

Two days before the status conference with the court, Conteh filed a declaration indicating he had a "fully executed" agreement with new counsel, but he was working through international logistical issues to provide the agreed upon retainer

payment.[2] He requested the status conference be continued by one week, to February 5, 2016, indicating he was "hopeful that new counsel [could] appear on [defendants'] behalf" at that time.

The court held the status conference on the originally scheduled date. Conteh appeared telephonically. The court took no action other than to indicate, as it had previously, that if the entity defendants did not retain new counsel, their answer would be stricken.

Meanwhile, seeking to set a date to hear plaintiffs' motions for discovery sanctions, the referee provided the parties with a list of available dates and asked them to indicate which was preferred. Conteh did not respond after multiple attempts to reach him, so the referee set the matter for the latest of the dates listed—February 5, 2016.

No one appeared for defendants on the day the referee considered the sanctions motions, nor did anyone contact the referee on behalf of defendants in the five days thereafter before the referee issued an order. The resulting 29-page order detailed the referee's findings of a "pattern of discovery abuse" committed by defendants, including "a willful failure to comply with [the referee's] [d]iscovery [o]rders." It concluded that the violations "left [p]laintiffs on the eve of trial without an answer even to a standard form interrogatory regarding [Conteh's] own affirmative defenses." Consequently, the referee granted terminating sanctions against defendants. Conteh was served in three different ways with a copy of the referee's order.

Approximately one week later, defendants' new counsel filed a notice of appearance with the court. He sought to have the trial date continued, a request which the court granted, but did not seek relief from the terminating sanctions order despite being aware of it.

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[2] On our own motion, we take judicial notice of the declaration Conteh filed with the trial court, as the copy contained in the record is incomplete. (Evid. Code, §§ 452, subd. (d), 459.)

Ultimately, based on the referee's order, the court struck the defendants' answers and entered default against them. Following a default prove-up hearing, at which plaintiffs' presented evidence concerning the relief sought, the court concluded plaintiffs established entitlement to only a portion of the requested relief. Specifically, the court ordered the creation of a constructive trust on behalf of African Wireless—the company of which plaintiffs are shareholders—over the 51 shares of Rosotel and two shares of Congolese Wireless Network at issue in the case. Judgment was entered accordingly. At plaintiffs' request, the court later amended the judgment to further mandate that defendants turn over the shares "forthwith" to African Wireless.

Defendants appealed following entry of the amended judgment.[3]

II

DISCUSSION

Defendants challenge both the referee's order granting terminating sanctions and the trial court's amended judgment. As for the former, they contend the referee lacked authority to grant such drastic sanctions and that doing so violated their constitutional due process rights, particularly because they were not represented by counsel at the time the referee heard the matter. They do not contest the referee's factual findings or the weight of the evidence supporting the referee's conclusions. With respect to the amended judgment, defendants argue the court improperly awarded relief that an attachment to the complaint evidenced is unavailable. They also assert the court should have granted them relief under Code of Civil Procedure, section 473, subdivision (b).[4] Each of these contentions lack merit; defendants fail to demonstrate error.

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[3] At defendants' request, this court granted a writ of supersedeas staying enforcement of the amended judgment pending resolution of this appeal.

[4] All further statutory references are to the Code of Civil Procedure unless specified otherwise.

A. Appealability

Preliminarily, we address plaintiffs' contention concerning the timeliness of defendants' challenge to the referee's order. They argue the order was directly appealable and by failing to so appeal, defendants waived their right to challenge the order. Not so. Plaintiffs misread our decision in a prior appeal in this case. There, we found that a monetary sanctions order by the referee was directly appealable because (1) the referee was appointed by a general reference (§ 638), making the referee's order the equivalent of a court order, *and* (2) a monetary sanctions order in an amount over $5,000 is directly appealable (§ 904.1, subd. (a)(12)). (*Lindsey I*, *supra*, 9 Cal.App.5th at p. 1302.) In contrast, "[a]n order granting terminating sanctions is not appealable, and the losing party must await the entry of the order of dismissal or judgment . . . ." (*Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 940.) Thus, defendants' challenge was timely and is properly before us.

B. Discovery referee's authority to grant terminating sanctions

Defendants wage two attacks on the terminating sanctions order. The first concerns the referee's authority to issue such sanctions, and the second relates to defendants' purported lack of legal representation at the time the referee heard the matter. Both lack merit.

As we concluded in *Lindsey I*, the reference order appointing the referee in this case was a general reference made pursuant to section 638. (*Lindsey I*, *supra*, 9 Cal.App.5th at p. 1303.) All parties acknowledge the preclusive effect of that holding. (See *Wilder v. Whittaker Corp.* (1985) 169 Cal.App.3d 969, 972 [under law of the case doctrine, matter adjudicated on prior appeal generally may not be relitigated on subsequent appeal in same case].) Acting under a general reference, a referee "hear[s] and determine[s] any or all of the issues in an action or proceeding, whether of fact or of law, and . . . report[s] a statement of decision [to the court]." (§ 638, subd. (a).) Nothing

in the statute limits the scope of issues a general reference referee may decide. Although defendants contend otherwise, claiming terminating sanctions fall within the exclusive jurisdiction of the trial court, they provide no authority indicating such a limit.

The language of the general reference in this case confirms the referee's authority to impose terminating sanctions under the circumstances. It authorized the referee to, among other things, set any hearings determined by the referee to be necessary, preside over the hearings, and "*rule on* discovery objections, *discovery motions*, and other requests made during the course of the hearing." (Italics added.) Further, it required the referee to "submit a written decision to the parties and to the Court within 20 days after the completion of any hearing, with findings and decisions thereon, including a decision for allocation of payment *and any decision for the imposition of sanctions*." (Italics added.) This unambiguous language, which derived from a "'[s]tipulation [a]nd [r]equest'" of the parties, clearly authorized the referee to rule on plaintiffs' discovery motion for terminating sanctions.

C. Due process

Emphasizing they were allegedly unrepresented by counsel at the time the referee issued the sanctions order and they were purportedly never warned of the possibility of terminating sanctions, defendants claim the referee's order violated their constitutional due process rights. We disagree.

"'[T]he purpose of due process is to ensure "fundamental fairness . . . ."'" (*Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, 1292-1293.) As with all areas of law, due process in the context of sanctions "mandates adequate notice and opportunity to be heard prior to the imposition [of them]." (*Barrientos v. City of Los Angeles* (1994) 30 Cal.App.4th 63, 70.) The notice provided "must specify the authority relied upon and must advise of the specific grounds and

conduct on which sanctions are to be based." (*Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1178.)

It is undisputed defendants received notice of plaintiffs' motion for sanctions. The notice advised them when the motion would be heard, the requested factual findings of particular discovery violations, and the relief sought. Specifically, the plaintiffs asked for "[t]erminating [s]anctions against Conteh and the [entity] [d]efendants[,]" to consist of defendants' answers being "stricken and default entered against them." Accompanying the notice were points and authorities, as well as a plethora of evidence, supporting plaintiffs' request.

There was one month between the time of the notice and the hearing before the referee. Defendants had the opportunity to be heard, but they inexplicably did not submit any response to the motion. Nor did they appear at the telephonic hearing despite Conteh having participated in a court hearing by telephone just one week prior. "'[I]t is inappropriate to allow any party to "trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable." [Citation.]'" (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 800.)

Conteh's reliance on his "unrepresented" status when the sanctions motion was filed and heard is of no avail. It is fundamental that "mere self-representation is not a ground for exceptionally lenient treatment." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) "Under the law, a party may choose to act as his or her own attorney. [Citations.] '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; see *Rappleyea*, at pp. 984-985 [rules "apply equally to parties represented by counsel and those who forgo attorney representation"].) Just as Conteh's temporary self-representation would not excuse him from complying with his discovery obligations and obeying court orders, it

did not preclude the referee from imposing terminating sanctions when he repeatedly failed to comply with its discovery orders.

Further weighing against defendants is their lack of communication with the referee. When the referee originally proposed a date for the hearing, someone acting on Conteh's behalf responded it would "not work for him." The referee proposed four alternative dates but received no response. A couple of weeks later, someone else acting on Conteh's behalf advised the referee that defendants were in the process of retaining new counsel and indicated they expected the process would be complete within 10 days. Contrary to Conteh's present assertion, however, there was no accompanying request to continue the hearing, which at that time was still more than two weeks away. Thus, the referee instructed the hearing on the sanctions motion would remain as calendared "until [the referee] receive[d] any correspondence from Mr. Conteh's new counsel regarding continuing it." After that, it appears there was nothing but radio silence from defendants. There is no indication in the record that they, or anyone on their behalf, requested the hearing be continued. Defendants cannot sit back, do nothing to protect themselves, and then expect this court to cast a lifesaver into the water.

Equally unavailing is defendants' unsupported assertion that the referee had to warn them of the possibility of terminating sanctions prior to imposing them. As previously discussed, plaintiffs notified defendants that they were seeking terminating sanctions. They were not caught off guard. Further, defendants were well aware the referee previously found them to be in violation of discovery orders. "The discovery statutes . . . 'evince an incremental approach to discovery sanctions, *starting* with monetary sanctions and *ending* with the ultimate sanction of termination.'" (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604.) Having already been subjected to significant monetary sanctions, and given the alleged pattern of addition violations, the potential for terminating sanctions was readily apparent.

"A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, [there is justification for] imposing the ultimate sanction." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.) After showing restraint in ruling on plaintiffs' first few motions for discovery sanctions, the referee found the need for the ultimate sanction. None of defendants' legal arguments convince us that such action must be disturbed.

D. Relief from default under Code of Civil Procedure section 473(b)

Turning to the trial court's actions, defendants contend the court should have granted them relief under section 473, subdivision (b), from the striking of their answers and entry of default.[5] They fault the court for "not even rul[ing] on [the issue]."

Defendants overlook, however, that despite being served with a copy of the order granting terminating sanctions very shortly after it was issued, they did not affirmatively move for relief under section 473 prior to entry of the default judgment. Instead, they simply raised section 473 in their opposition to plaintiffs' motion to strike the answers in accordance with the referee's order. The court may not grant relief under those circumstances. An affirmative motion under the statute, accompanied by supporting documents, is required. (§ 473, subd. (b); *Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 340 [application for relief under section 473, subdivision (b) requires notice motion served on adverse party]; *Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 729 ["[W]hen relief is sought from a terminating sanction imposed for

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[5] Under section 473, subdivision (b), "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

failing to provide discovery responses, the application must be accompanied by verified responses to the discovery in question"].)

Presumably recognizing the weakness in their argument, defendants argue for the first time in their reply brief that they filed a noticed motion for relief under section 473, subdivision (b), *after* the court entered a default judgment. While it appears they did so, the court did not hear the motion until the day defendants filed their notice of appeal from an amended default judgment which the court entered two months earlier—the appeal presently before us. The court's denial of their postjudgment motion under section 473 was separately appealable (§ 904.1, subd. (a)(2)), but defendants never filed a notice of appeal therefrom. Accordingly, the issue is not properly before us. (See *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46-47.)

E. Relief awarded by the default judgment

Challenging the amended default judgment itself, defendants claim it was error for the court to order that a constructive trust be established on behalf of African Wireless over 51 shares of Resotel transferred from African Wireless to another business entity. They contend facts set forth in an exhibit to the complaint establish that such relief was not available. We disagree.

"Generally, a defendant in default 'confesses the material allegations of the complaint. [Citation.]' [Citation.] Nonetheless, the trial court may not enter a default judgment when the complaint's allegations do not state a cause of action. [Citations.] No judgment can rest on such a complaint, as a defendant in default '"admits only facts that are well pleaded."' [Citations.]" (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 392.)

Where a defendant contends on appeal from a default judgment that a complaint's allegations are inadequate to state a cause of action, our review is de novo.

(See *Choy v. Redland Ins. Co.* (2002) 103 Cal.App.4th 789, 796.) We review the complaint in a manner akin to review of a general demurrer, determining "whether the complaint lacks factual allegations indispensable to the asserted claims. [Citations.]" (*Los Defensores, Inc.*, *supra*, 223 Cal.App.4th at pp. 392-393.) We "must indulge reasonable inferences in support of the factual allegations of the complaint" (*id*. at p. 393), but we must disregard any "'contentions, deductions or conclusions of law'" alleged therein (*Crawley v. Alameda County Waste Management Authority* (2015) 243 Cal.App.4th 396, 403). "[M]ere uncertainties and other defects subject to a special demurrer do not bar a default judgment against the defendant. [Citations.]" (*Los Defensores, Inc.*, *supra*, 223 Cal.App.4th at p. 393.)

Here, the relief at issue is a constructive trust, an equitable remedy which "'compel[s] the transfer of property from [a] person [or entity] wrongfully holding it to the rightful owner.'" (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 399.) To establish a right to such relief under the circumstances, the complaint's allegations needed to show: (1) the existence of a res (property or some interest in property); (2) plaintiffs' right to that res; and (3) some wrongful acquisition of it by another party who is not entitled to it. (*Communist Party v. 522 Valencia, Inc*. (1995) 35 Cal.App.4th 980, 990.)

The well-pleaded allegations in the operative complaint demonstrated as much. As alleged, plaintiffs are shareholders who filed this shareholder derivative action on behalf of nominal defendant American Wireless. In early 2000, the members of Resotel (a Congolese partnership) transferred 51 shares of Resotel to American Wireless. At the end of the following year, Conteh "secretly" and without authorization "caused [American Wireless'] 51 shares of Resotel to be transferred to [another entity]" without compensation to American Wireless. Conteh did not disclose the transaction to American Wireless shareholders, including plaintiffs, but plaintiffs brought suit against him some four years later when they eventually learned of the unauthorized share

transfer. These facts, together, fully support the court's ordering of a constructive trust on behalf of American Wireless' over the 51 Resotel shares at issue.

Defendants point to an exhibit attached to the complaint, namely a purported September 2012 ruling of a magistrate's court of criminal affairs in the Congo, arguing it conclusively showed American Wireless did not have a right to the 51 shares of Resotel. Specifically, they claim the ruling "voided" the original transfer of those Resotel shares to African Wireless. Defendants reason that because the original transfer was "voided," African Wireless never legitimately possessed the shares at issue, meaning the court should not have ordered a constructive trust on its behalf.

The parties disagree about the legal effect of the document's attachment to the complaint, but we need not reach that issue because even if we were to agree with defendants' position, their argument fails. The Congo court's ruling does not say what they claim. Nowhere does the word "void," or any variation of it, appear. And nowhere is there any language which remotely indicates that the court invalidated the transfer of the 51 Resotel shares to African Wireless. This is not surprising. The matter before the court was not an action seeking to remedy a wrongful transfer. Rather, it appears to have been a criminal action alleging Conteh forged documents and committed fraud. And the apparent punishment resulting from the court's findings was a one-year jail sentence—a punishment which Conteh allegedly avoided by fleeing the country. Simply put, there is nothing in the document which demonstrates the constructive trust relief at issue was unavailable.

F. Characterization of the relief awarded in the default judgment

Defendants request for the first time in their reply brief that we determine whether the judgment may be enforced as one for money. Such an issue is not before us as it concerns postjudgment enforcement matters which postdate the default judgment

from which defendants appealed. It is proper for adjudication in the trial court in the first instance.

III

DISPOSITION

The judgment is affirmed. The stay of enforcement of the judgment issued by this court pending resolution of this appeal is dissolved. Respondents are entitled to their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.